

ST 95-27

Tax Type: SALES TAX

Issue: Overstamping of Packages of Cigarettes

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)
OF THE STATE OF ILLINOIS)
)
) No.
) Claims For Credit
)
XXXXXX)
) Daniel D. Mangiamele
) Admin. Law Judge
)
) Taxpayer

RECOMMENDATION FOR DISPOSITION

APPEARANCES: XXXXX

SYNOPSIS: This matter comes on for hearing pursuant to the Department of Revenue denial of taxpayer's two Claims for Credit in the amount of \$15,443.67 and \$6,357.40. The Department prepared two amended returns for the audit period April 1989 through October 1990 showing overstamping of cigarettes in the amounts indicated in taxpayer's Claims for Credit. At issue is whether taxpayer is entitled to their Claims for Credit for overstamping of packages of cigarettes. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department of Revenue.

FINDINGS OF FACT:

1. The Department's prima facie case, inclusive of all jurisdictional elements, was established by the admission into evidence of the notice of Department's tentative determination of the Claims for Credit, the notice of hearing, taxpayer's protest letter, and registered post office return receipt card. Dept.'s Ex. 1-5

2. Taxpayer is a licensed cigarette distributor. Tr.-10

3. Taxpayer's Claims for Credit are based on an audit which

disclosed payments for cigarette stamps were made as a result of over stamping packages of cigarettes for the period April 1989 through October 1990. Tr.-12

4. Over stamping of packages of cigarettes resulted from taxpayer's own action. Tr. 13-14, 18

CONCLUSIONS OF LAW: On examination of the record established, this taxpayer has demonstrated by the presentation of testimony or through exhibits or argument, evidence insufficient to overcome the Department's denial of taxpayer's Claims for Credit.

Taxpayer argues that over stamping of packages of cigarettes resulted from the malfunction of their stamping machine and relies on the Cigarette Tax Act Chapter 35 ILCS 130/9d which provides in part, as follows:

If it appears, after claim therefor filed with the Department, that an amount of tax or penalty has been paid which was not due under this Act, whether as the result of a mistake of fact or an error of law, except as hereinafter provided, then the Department shall issue a credit memorandum or refund to the person who made the erroneous payment or, if that person has died or become a person under legal disability, to his or her legal representative, as such.

I find this section does not give this taxpayer the relief sought. In Illinois it is the general rule that a taxpayer may not recover taxes which have been voluntarily paid unless such recovery is authorized by statute. (Geary v. Dominick's Finer Foods, Inc. (1989), 129 Ill.2d 389). In order for the taxpayer to be entitled to reimbursement for the Cigarette Tax paid in this matter, it must show that the tax was paid pursuant to a mistake of fact or error of law. It is clear that all payments made by the taxpayer to the Department were in accordance with the mandates contained in the Cigarette Tax Act as provided in (35 ILCS 130/1 et. seq.) and not as a result of an error of law. Nor was there any mistake of fact which induced the taxpayer to make such payments.

I find from the testimony that a break down of his equipment does not

constitute a mistake of fact or error of law which would act to trigger the Claim for Credit provisions of section 9d of the Cigarette Tax Act. In effect, the taxpayer is asking the Department and, through it, the People of the State of Illinois, to bear a portion of the risk of loss associated with the day to day operation of its business.

The Cigarette Tax Act mandates that the "... impact of the tax is imposed on the retailer ...". The Cigarette Tax Act also requires that the Distributor prepay the tax and reimburse himself for that payment by including the tax in the price the retailer pays. Section 9d makes no provision for the issuance of a credit memorandum or refund in circumstances such as occurred here. Without such a provision the Department is without the legal authority to do that which the taxpayer requests. I am, therefore, recommending that the Claim for Credit be denied.

Administrative Law Judge